(1)

Supreme Court, U.S.
FILED

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No. _____

IN THE
UNITED STATES SUPREME COURT
October Term, 1995

MICHAEL B. KING,

Petitioner,

v.

CLAYTON COUNTY COMMISSION,
TEE CASSELLS, sheriff deputy,
SCOTT LOVETT, sheriff deputy
and DAVID G. LEMACKS, Clayton
County Sheriff,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Michael B. King
Attorney Pro Se
116 South Main St., Ste. 9
Jonesboro, GA 30236
(770) 478-3555

53 pp

QUESTIONS PRESENTED

1. Whether the Fourth Amendment imposes an absolute ban on warrantless and nonconsensual police searches of innocent citizens' homes for suspects named in traffic court arrest orders.

2. Whether the trial court erred in charging the jury that probable cause was one exception to the search warrant requirement of the Fourth Amendment and emergency situations was another separate exception, and failing to charge that both probable cause and exigent circumstances must exist to justify a warrantless and nonconsensual police search of an innocent citizen's home.

3. Whether the trial court erred in failing to charge the jury that the gravity of the offense charged in a traffic court arrest order is a factor that must be considered in determining whether exigent circumstances existed to justify a warrantless and nonconsensual police search of an innocent citizen's home.

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UNITED STATES CONSTITUTION

Fourth Amendment. 6

No. _____

IN THE
UNITED STATES SUPREME COURT
October Term, 1995

MICHAEL B. KING,
Petitioner,

v.

CLAYTON COUNTY COMMISSION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

1. The decision of the Court of Appeals denying the motion for rehearing is attached as Appendix A.

2. The judgment of the Court of Appeals is attached as Appendix B.

3. The non-published opinion of the Court of Appeals affirming the trial court order is attached as Appendix C.

4. The trial court order denying the motion for a new trial is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was originally entered on August 24, 1995. A timely motion for rehearing and a recommendation for rehearing en banc was made. That motion was denied on December 14, 1995. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. 1254.

UNITED STATES CONSTITUTION

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On or about May 23, 1989, the petitioner and his teenage son, Michael, resided at 5751 Riverdale Road, Apt. 25H, College Park, Georgia. No other person lived at petitioner's apartment. Petitioner lived in a peaceful, quiet and safe apartment community.

At approximately 6:00 p.m., on May 23, 1989, sheriff deputies, Tee Cassells and Scott Lovett, drove to petitioner's apartment to search for "Stevie King," a person named in a traffic arrest order, and charged with failing to pay a speeding fine. The deputies testified at trial that they had no knowledge that he was located inside the petitioner's apartment when they entered the apartment.

The deputies opened the front door of the apartment and entered with their guns drawn. They searched every room of petitioner's apartment for Stevie King. The deputies found no one inside the apartment. When the deputies heard petitioner's son open the front door, they ran downstairs to meet him, pointed their guns at him, commanded him to freeze and asked him about "Stevie King." Petitioner's son, fearing for his safety, told the deputies that Stevie King did not live in his apartment.

During the trial, petitioner moved for a judgment as a matter of law on the reasonableness of the search because the deputies admitted during their testimony that they had no knowledge of who was in petitioner's apartment prior to the search. The court denied this motion. After the defendant's presented their evidence, the court charged the jury, over petitioner's objection, that one "exception" to the search warrant requirement "arises when police officers are ordered to effect the arrest of a person suspected of violating the law" and "the officers have a reasonable belief that the suspect lives at the residence and that the suspect is inside." (See Appendix E). The court further charged: "Another exception is recognized in emergency situations in which a law enforcement officer ... may enter and make a safety inspection for purposes of insuring or protecting his well-being and the well-being of others." (See Appendix E).

The petitioner requested the court to charge: "The sheriff deputy seeking to justify his warrantless entry into plaintiff's home bears a heavy burden of showing probable cause and exigent circumstances." The court did not give this charge or any charge instructing the jury that both probable cause and exigent

circumstances must exist to justify a warrantless home search. The petitioner also requested the court to charge: "Factors which indicate exigent circumstances include: (1) the gravity or violent nature of the offense which the suspect is to be charged." The court did not give this charge or a similar jury charge.

The jury returned a verdict in favor of the defendant deputies. Petitioner filed a motion for a new trial. This motion was denied. Petitioner appealed the denial of his motion to the Eleventh Circuit Court of Appeals. The Court affirmed the trial court's order. This case is now before this Honorable Court on Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Fourth Amendment Imposes An Absolute Ban On Warrantless And Nonconsensual Police Searches Of Innocent Citizens' Homes For Suspects Named In Traffic Court Arrest Orders.

The search of petitioner's home, by sheriff deputies, for another person named in a traffic arrest order was per se prohibited by the Fourth Amendment to the United States Constitution. The Fourth Amendment imposes an absolute bar on police searches of a third person's home for a suspected traffic violator. Probable cause and exigent circumstances do not justify a warrantless police search of a third person's home for another person named in a traffic arrest order.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Constitution, Fourth Amendment. In Payton v. New York, 445 U.S. 573 (1980), this Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. The Court recognized, as "a basic principle of Fourth Amendment law, that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton, at 586.

In response to the "suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake," the Court concluded that an arrest warrant, though affording less protection than a search warrant, would suffice: "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within" Payton, at 603.

The decision in Payton was expressly limited to felony arrests. Id, at 602. In Welsh v. Wisconsin, 466 U.S. 740 (1994), this Court held illegal a warrantless entry of the suspect's home to arrest him for a traffic violation. Noting the alleged crime was a civil offense not punishable by imprisonment, the Court found it "difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." Welsh, at 753. The Court further noted: "Because we conclude that, in the circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, we have no occasion to consider whether the Fourth Amendment may impose an absolute bar on warrantless home arrest for certain minor offenses." Id., at 749, n. 11.

The Framers of the United States Constitution probably did not intend to authorize government enforcement agents to search the homes of private citizens for other persons named in arrest warrants and charged with minor offenses. A per se rule concerning this issue is necessary to protect innocent citizens from abusive or arbitrary enforcement, and invasions of their homes, when police officers search for suspects accused of committing only minor traffic offenses. There is no exigent circumstance that would justify a warrantless and nonconsensual search of private citizen homes for other persons charged with committing minor traffic offenses.

2. Both Probable Cause And Exigent Circumstances Must Exist To Justify Warrantless And Nonconsensual Police Searches Of Innocent Citizens' Homes.

It was error for the trial court to charge the jury that probable cause is one "exception" to the requirement that police officers have a search warrant before they enter a home to "effect the arrest of a person suspected of violating the law and another "exception is recognized in emergency situations." (See Appendix E). This Court and most circuit courts have consistently held that both probable cause and exigent circumstances must exist to justify a warrantless and nonconsensual police search of a home for a person named in an arrest warrant, infra. No court, except the Eleventh Circuit, has sanctioned a warrantless and nonconsensual police search of a private citizen's home for another person named in a traffic court arrest order, supra. Assuming that such a search is not per se barred by the

Fourth Amendment, both probable cause and exigent circumstances must exist to justify the search, infra.

In Payton v. New York, supra, at 583-590, this Court decided that warrantless felony arrests in homes are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. In Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974), Llaguno v. Mingey, 739 F.2d 1186 (7th Cir. 1984) and United States v. Davis, 785 F.2d 610, 615 (8th Cir. 1986), the circuit courts recognized the principle that both probable cause and exigent circumstances must exist to justify a warrantless and nonconsensual search of a home. The decisions in the above cases were limited to felony arrests. In Welsh v. Wisconsin, 466 U.S. 740 (1984), this Court recognized that the principle applied to a warrantless and nonconsensual police search of the home of a person suspected of driving under the influence of alcohol.

In the case at bar, the trial court charged the jury, over petitioner's objections, that probable cause was one exception to the search warrant requirement and exigent circumstances was another requirement. (See Appendix E). No other court has recognized probable cause as a separate exception to the search warrant requirement, supra. The jury charge was an inaccurate statement of the law, supra. The charge was contrary to the holdings in Payton, Welsh, Volz, Llaguno and Davis, supra. The charge improperly authorized the jury to return a verdict against the petitioner if it found either probable cause or exigent circumstances existed to justify the

search of the petitioner's home. Assuming that the search was not per se barred by the Fourth Amendment, the trial court should have charged the jury that both probable cause and exigent circumstances were required to justify the search of the petitioner's home. The trial court believed that either was required to justify the search. (See Appendix E.).

3. The Gravity Of The Offense Charged In A Traffic Court Arrest Order Is A Factor That Must Be Considered In Determining Whether Exigent Circumstances Existed To Justify A Warrantless And Nonconsensual Police Search Of An Innocent Citizen's Home.

It was error for the trial court to refuse to charge the jury on exigent circumstances as requested by the petitioner. Petitioners submitted a requested charge that stated: "Factors which indicate exigent circumstances include: (1) the gravity or violent nature of the offense with which the suspect is to be charged." The court refused to charge the jury that it must consider the gravity of the offense charged in the arrest order when determining whether exigent circumstances existed to justify the warrantless and nonconsensual search of the petitioner's home. (See Appendix E).

In Welsh v. Wisconsin, supra, at 753, this Court held "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." This principle was not applied to the facts in the petitioner's case because no jury charge concerning this principle

was given to the jury. (See Appendix E). The jury probably would have found that the search of a petitioner's home for another person charged with a traffic offense did not establish an exigent circumstance. Because the court's jury charge on exigent circumstances omitted a necessary part of the law, the charge was incomplete. No circuit court should sanction the giving of incomplete charges to the jury, and nor should this Court of justice. The giving of incomplete jury charges on Fourth Amendment law threatens the integrity of the court and creates legal confusion.

CONCLUSION

For the reasons stated herein, the petitioner believes that his Petition for Writ of Certiorari should be granted.

This 13th day of March, 1996.

Respectfully submitted,

MICHAEL B. KING
Attorney Pro Se
Georgia Bar No. 421140
116 South Main St.
Suite 9
Jonesboro, GA 30236
(770) 478-3555

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8870

MICHAEL B. KING,

Plaintiff-Appellant,

MICHAEL B. KING, Jr.,

Plaintiff,

versus

CLAYTON COUNTY COMMISSION; DAVID G. LEMACKS, Individually and in his official capacity as Sheriff of Clayton County; TEE CASSELLS and DAVID G. LEMACKS, Individually and in their official capacities as deputies with the Clayton County Sheriff's Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR HEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19 ___, ____ F. 2d____).

Before: ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S/_____
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8870
Non-Argument Calendar

D.C. Docket No. 1:91-cv-1183

MICHAEL B. KING,

Plaintiff-Appellant,

and

MICHAEL B. KING, JR.,

Plaintiff,

versus

CLAYTON COUNTY COMMISSION, and TEE CASSELLS, Individually and in his official capacity as deputy with the Clayton County Sheriff's Department, and DAVID G. LEMACKS, Individually and in his official capacity as sheriff of Clayton County, JOHN DOE, Individually and in his official capacity as deputy with the Clayton County Sheriff's Department, and SCOTT LOVETT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before ANDERSON, BLACK and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 24, 1995

For the Court: Miguel J. Cortez, Clerk

By: S/_____
Deputy Clerk

ISSUED AS MANDATE: 12-27-95

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8870
Non-Argument Calendar

D. C. Docket No. 1:91-cv-1183

MICHAEL B. KING,

Plaintiff-Appellant,

and

MICHAEL B. KING, JR.,

Plaintiff,

versus

CLAYTON COUNTY COMMISSION,
and
TEE CASSELLS, Individually and
in his official capacity as
deputy with the Clayton County
Sheriff's Department,
and
DAVID G. LEMACKS, Individually and
in his official capacity as
sheriff of Clayton County,

and
JOHN DOE, Individually and
in his official capacity as
deputy with the Clayton County
Sheriff's Department,
and
SCOTT LOVETT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 24, 1995)

Before ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Appellant Michael B. King, an attorney proceeding pro se, appeals the district court's denial of a motion for judgment as a matter of law and for a new trial, and its refusal to give requested jury instructions. For the reasons that follow, we affirm.

In May 1989, a state court judge issued an order in Cobb County, Georgia, for the arrest of "Stevie King" for failure to appear and pay a traffic fine. The address listed for Stevie

King on the arrest order, traffic citations, and the cover letter accompanying the arrest order was 5751 Riverdale Road, College Park, Georgia. As no apartment number was given, two sheriff's deputies spoke to the manager of Huntington Woods Apartments, located at 5751 Riverdale Road. The manager indicated that only one tenant with the surname King resided in the complex, in apartment 25-H, although his first name was Michael. One of the deputies testified that the manager believed Appellant fit the general description of Stevie King.

Based on this information, two other sheriff's deputies, Cassells and Lovett, went to apartment 25-H to execute the arrest on Stevie King. The deputies knocked on the door several times but received no response. The deputies check the rear of the apartment and noticed that all the curtains were drawn. They then entered and began to search the apartment with their weapons drawn. At some point during the search, Appellant's son, Michael, Jr., entered the apartment. The

deputies questioned Michael, Jr., about his knowledge of Stevie King and left after determining that Stevie King did not reside there.

Thereafter, Appellant and his son, Michael, Jr., filed this civil rights action under 42 U.S.C. § 1983. The Kings alleged that Cassells and Lovett violated their Fourth and Fourteenth Amendment rights by conducting an illegal search of their home while they were not at home.[1] At trial, Appellant made a motion for judgment as a matter of law at the close of this case, arguing that the evidence showed no probable cause for entering and searching the apartment. The court denied the motion, and Appellant failed to renew the motion at the close of the evidence. During the jury charge conference, Appellant objected to the court's proposed instructions as to the probable

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[1] The complaint also named the Clayton County Commission (Commission) and David Lemacks, the sheriff of Clayton County, and stated a § 1983 illegal seizure claim. The district court granted summary judgment as to these two defendants, and as to these two claims.

cause standard and to the court's refusal to give his requested jury instruction numbers 6, 10, and 12.

The jury found that Cassells and Lovett did not conduct an unreasonable search of King's residence and rendered a verdict in favor of them. Appellant's motion for a new trial was subsequently denied. On appeal, Appellant contends that the district court erred by: (1) failing to grant his motion for directed verdict; (2) incorrectly instructing the jury on probable cause; and (3) refusing to give Appellant's proposed jury instructions.

As to the first issue, Appellant argues that the court should have granted his motion for judgment as a matter of law because, before entering his home, neither Cassells nor Lovett had any information that Stevie King resided in or was inside apartment 25-H. As such, he contends that they lacked probable cause to search his residence. Appellant also argues that the deputies did not have an exigent reason to enter and search his home without a warrant or his consent.

Absent a motion for judgment as a matter of law at the close of all evidence, this Court reviews the district court's submission of the issue to the jury under the plain error standard to determine whether any evidence supported submission of the issue. Georgetown Manor, Inc., v. Ethan Allen, Inc., 991 F.2d 1533, 1540 (11th Cir. 1993), rev'd on other grounds, 47 F. 3d 1099 (11th Cir. 1995). As Appellant failed to renew his motion for judgment as a matter of law at the close of all evidence, the ruling must be upheld if any evidence supports submission of the liability issue to the jury.

In the instant case, there was ample evidence to support the submission of the case to the jury on the existence of probable cause and exigent circumstances in that: (1) Cassells and Lovett both testified that the arrest order and other documents in their possession indicated that Stevie King resided at 5751 Riverdale Road; (2) Appellant was the only tenant at that address with the surname King; (3) Cassells and Lovett, based upon the information previously obtained by two

other deputies, believed that Appellant fit the general description of Stevie King; and (4) Cassells and Lovett testified that the front door to the apartment was open, and no one responded to their knocks at the door. The district court thus properly denied the motion.

As to Appellant's second contention, he argues that the district court should have granted a new trial because the jury instructions concerning probable cause and exigent circumstances were incomplete, inaccurate, and misleading. He contends that the court erroneously instructed the jury that either probable cause or exigent circumstances justified the warrantless search of his home, when in fact probable cause must exist to support any search. He also claims the court instructed the jury on a subjective, rather than an objective, standard of probable cause.

This Court reviews the district court's denial of a motion for new trial based on erroneous jury instructions for abuse of discretion. Christopher v. Cutter Laboratories, 53 F.3d 1184,

1190 (11th Cir. 1995). Thus, this Court must examine the jury instructions in their entirety to determine whether they fairly and adequately addressed the issued and correctly stated the law. Id.

A warrantless search of a home will be upheld if both probable cause and exigent circumstances exist. United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir.) cert. denied, 112 S. Ct. 299 (1991). Probable cause exists, under the totality of the circumstances, when there is a fair probability that contraband or evidence of a crime will be found in a particular place. Id. An exigent situation may arise when there is "a likelihood that delay could cause the escape of a suspect or the destruction of essential evidence, or jeopardize the safety of officers of the public." United State v. Standridge, 810 F.2d 1034, 1037 (11th Cir.), cert. denied, 107 S. Ct. 2468 (1987).

An arrest warrant alone is an insufficient basis for searching a third party's home for an individual named in the arrest warrant. See United States v. De Parias, 805 F.2d 1447,

1457 (11th Cir. 1986), cert. denied, 107 S. Ct. 3189 (1987). An arrest warrant issued by a judicial officer and founded on probable cause, however, implicitly carries with it the limited authority to enter dwelling when an officer has reason to believe that the person named in the warrant resides and is located within the dwelling. See id. The Fourth Amendment also prohibits an officer from making a warrantless and non-consensual entry into a suspect's home for purposes of making an arrest, unless exigent circumstances exist. Cf. Standridge, 810 F.2d at 1036.

Although the district court did not specifically state that both probable cause and exigent circumstances must exist to support a warrantless search, the court's charged as a whole was an accurate statement of the law. First, the court instructed the jury that the police can search a home to arrest a person named in a warrant, if they reasonably believed the person resided in and was located within the residence. Second, the court stated that an emergency or exigent situation may exist if the officers

had a reasonable and good-faith belief of a serious threat to their safety or that of another, or if someone were in need of immediate aid. Third, contrary to Appellant's assertions, the court instructed the jury on the objective standard of reasonableness when it stated that a reasonable belief exists "if facts and circumstances apparent at the time would indicate to a reasonable person that the situation exists." Thus, the district court did not abuse its discretion by denying a new trial on the basis of erroneous jury instructions.

Appellant's third contention on appeal, that the district court erred in refusing to give certain requested jury instructions, is without merit. Specifically, Appellant's proposed jury instruction number 6 was a definition of probable cause; number 10 described factors that indicate exigent circumstances; and number 12 stated that no exigency is

created simply because probable cause exists to believe that a crime has been committed.[2]

As previously noted, this Court must examine the jury instructions in their entirety to determine whether they fairly and adequately addressed the issues and correctly state the law. Christopher, 53 F.3d at 1190. Even if the court committed error, the appellant must still show prejudice resulting from the failure to give the requested instruction before the judgment will be disturbed on that ground. Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1570 (11th Cir. 1991).

In this case, although the district court did not specifically use the terms "probable cause" or "exigent circumstances," the court's instruction adequately covered the concepts of probable cause and exigent circumstances. Thus, Appellant failed to

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[2]Appellant also contends that the court erred in refusing to give proposed instruction number 11, which stated that exigent circumstances cannot be created by police. He failed, however, to raise this objection at the charge conference, and we will therefore not address it on appeal.

show that the substance of the requested instructions was not adequately covered or that he suffered any prejudice.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING, SR. and MICHAEL B. KING, JR.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 1:91-CV-1183-JTC
TEE CASSELLS, individually and in his official capacity as Deputy Sheriff of Clayton County, and SCOTT LOVETT individually and in his official capacity as Deputy Sheriff of Clayton County	)	
Defendants.	)	

ORDER OF THE COURT

This matter is before the Court on Plaintiff's Motion for New Trial [#71] and Plaintiffs' Motion to Stay Payment of Costs [#73]. For the following reasons, Plaintiffs' motion for a new trial is **DENIED** and the motion to stay costs is **GRANTED.**

I. MOTION FOR NEW TRIAL

A court may grant a motion for new trial pursuant to Fed. R. Civ. P. 59 (a) when the trial was unfair, or the verdict was against the great weight of the evidence. Ard v. Southeast Forest Indus., 845 F.2d 315 (11th Cir. 1988). A motion for new trial may raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusing of instructions. Diane Manufacturing Co. v. Sheffield Indus. Inc., 514 F. Supp. 185 (S.D.Fla. 1981), aff'd, 685 F.2d 1387 (11th Cir. 1982). In considering a motion for a new trial, the court must view the evidence in the light most favorable to the verdict. Evans v. H.C. Watkins Memorial Hosp., 778 F.2d 1021, 1022 (5th Cir. 1985). In granting a motion for new trial based on the weigh of the evidence, the verdict must be against the great weight of the evidence, not just the greater weight of the evidence. Fondren V. Allstate Ins. Co., 790 F.2d 1533, 1533, 1535 (11th Cir. 1986). Nor may the court substitute its

own credibility choices for the credibility choices of the jury in making the determination. Id.

In this case, Plaintiffs argue that the Court erred by not granting their motion for directed verdict, by instructing the jury incorrectly on probable cause and exigent circumstances, and by instructing the jury that Defendants' "arrest order" constituted a valid "arrest warrant."

The Court has carefully considered the evidence produced at trial and the instructions given to the jury. The evidence of record clearly supports the jury's determination that both probable cause and exigent circumstances existed to justify Defendants' entry into Plaintiffs' residence. Moreover, the Court properly charged the jury on probable cause and exigent circumstances in accordance with applicable Supreme Court and Eleventh Circuit law. As to the arrest order, the undisputed testimony of State Court Judge Carlisle is adequate to support the Court's decision to grant Defendants' Rule 50 motion

concerning the validity of his bench warrant. Plaintiffs' motion for a new trial is, therefore, **DENIED.**

II. MOTION TO STAY COSTS

After the Clerk entered judgment on March 21, 1994, Defendants filed a bill of costs in the amount of $1,131.15. Plaintiffs moved for a stay of payment of costs pending review of the motion for a new trial. Defendants consented to the stay, asking the Plaintiffs be required to make payment after the Court decides the pending new trial motion.

Plaintiffs' motion for stay is **GRANTED.** Plaintiffs' are **ORDERED** to pay the taxed costs, or to file objections if appropriate, within ten days of the entry of this Order.

SO ORDERED, this 24th day of June, 1994.

S/
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

APPENDIX E

KING v. CASSELLS and LOVETT

1:91-CV-1183-JTC

Members of the Jury:

Now that you have heard all the evidence and are about to hear the arguments of counsel, it becomes my duty to give you instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence

in the case, follow the law as stated in these instructions, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, holding the same or similar stations in life. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equal in a court of justice.

As I stated, it is your duty to determine the facts, and in so doing you may consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted into the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. Quite simply, what the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, and not speculate as to any material issue, you are permitted to draw such reasonable inferences from the

testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the testimony and evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is "direct evidence," such as the testimony of an eyewitness. The other is indirect or "circumstantial evidence" -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the evidence in the case, both direct and circumstantial.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness' testimony. In weighing the testimony of a witness, you should consider the witness' relationship to the plaintiff or to the defendant; the witness' interest, if any, in the outcome of the case; the witness' manner of testifying; the witness' opportunity

to observe or acquire knowledge concerning the facts about which the witness testified; the witness' candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other believable evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more believable than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony on a material point.

If you believe that any witness has been so impeached, then it is your right to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

BURDENS OF PROOF

The burden is on the Plaintiff's in a civil action such as

this to prove every essential element of the Plaintiffs' claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence which, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a fact by a preponderance of the evidence means to prove that something is more likely so than not so. Should the conflicting evidence appear to be evenly balanced so that you cannot tell which side is more likely, then you must decide the case against the party who bears the burden of proof.

Each party's burden of proof remains the same throughout the case, that is, it never changes. In determining whether any fact in issue has been proven by a preponderance of the evidence, you should consider the testimony of all witnesses, regardless of who called them, and all exhibits, regardless of who offered them, including all reasonable inferences from the testimony and exhibits as seem justified in view of your experience and common sense. If the proof fails to establish any essential element of the Plaintiffs' claim, you should find for the Defendants as to that claim.

To correctly decide the disputed issues, you must first understand the federal law that controls the specific allegations

in this case. I will now explain how the law applies to the Plaintiffs' claims.

42 U.S.C. § 1983

Plaintiffs claim that Defendants violated section 1983 of Title 42 of the United States Code. That section entitles a person to sue in this Court to obtain an award of money damages against anyone who, "under color" of state law or custom, intentionally violates the Plaintiffs' rights under the Constitution of the United States. In this case, Plaintiffs claim that Defendants violated their constitutional right to be free from an unreasonable search of their home and its contents. Only unreasonable searches are prohibited by the Constitution. In determining reasonableness, the Defendants' conduct must be viewed in light of the facts and circumstances existing at the time of the search.

In order to prove their constitutional claims, Plaintiffs must prove by a preponderance of the evidence each of the following:

First: That the Defendants intentionally committed acts which violated one or more of the Plaintiffs' federal constitutional rights;

Second: That the Defendants acted "under color" of the authority of the State of Georgia; and

Third: That the Defendants' acts were the proximate cause of damages sustained by the Plaintiff.

In this case, the parties do not contest that the Defendants were acting under color of state law when they searched Plaintiffs home and you should, therefore, accept that fact as proven. Also, you are instructed that I have ruled as a matter of law that Defendants possessed a valid arrest warrant for "Stevie King" on the day of the incident.

The first aspect of Plaintiffs' claim that you must consider is whether Defendants subjected Plaintiffs to an unreasonable search of their home. As previously stated, the Constitution protects every citizens against "unreasonable" searches; and, ordinarily, this means that a search warrant must be obtained from a judicial officer before any search of a home may be made. There are, however, certain exceptions to this requirement. One such exception arises when police officers are ordered to effect the arrest of a person suspected of violating the law. Under these circumstances, if the officers

have a reasonable belief that the suspect lives at the residence and that the suspect is inside, the officers can enter and search the residence for the suspect. To apply this exception, you must determine whether Defendants reasonably believed that "Stevie King" resided at Plaintiffs' apartment, and was inside the apartment at the time of the search.

Another exception is recognized in emergency situations in which a law enforcement officer, if he has a reasonable and good faith belief that there is a serious threat to his safety or the safety of someone else, may enter and make a safety inspection for the purpose of insuring or protecting hid well-being and the well-being of others. The Constitution does not bar police officers from taking a warrantless entry into a private home when they reasonably believe that a person within is in need of immediate aid.

You are instructed that when the law refers to a "reasonable belief," that means that the facts and circumstances

apparent at the time would indicate to a reasonable person that the situation exists.

Although there are two Defendants in this action, it does not follow from the fact alone that if one is liable, both are liable. Each Defendant is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you govern the case as to each Defendant.

After considering all of the evidence presented in this case, if you find that Defendants did violate Plaintiffs' constitutional right to be free from an unreasonable search, then you must decide whether Plaintiffs suffered any damage as a direct result of Defendants' actions.

DAMAGES

At times in these instructions, I have used the term "proximate cause." An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. Put another way, for damages to be the proximate result of wrongful conduct, the Plaintiff must show that, except for such conduct, the damages to be the proximate result of wrongful conduct, the Plaintiff must show that, except for such conduct, the damages would not have occurred. Plaintiffs have the burden of proving actual damages by a preponderance of the evidence.

In this case, Plaintiffs are asking for an award of damages to compensate for Plaintiffs' claims of mental anguish, humiliation, and loss of reputation. If you find that Plaintiffs

suffered mental or emotional distress, loss of reputation, or other damages caused by an unreasonable search of their home, then you may award such damages which flow naturally from the Defendants' actions. Remember that compensatory damages are to be based upon the actual injuries caused by the deprivation of a constitutional right and not upon the abstract "value" or "importance" of the right in question.

Where mental or emotional distress or loss of reputation are proven, the Court cannot give you any rule by which to measure the specific amount of damages resulting from such an injury. This is a matter that is left to the conscience, good sense, and sound judgment of the jury. You should not act unreasonably through bias, passion, or sympathy, but should exercise common sense and fix an amount of damages that, in accordance with the evidence and the law, will fairly compensate Plaintiffs for all the injuries suffered.

If you find that Plaintiffs are entitled to a verdict in accordance with these instructions, but do not find that

Plaintiffs have sustained actual damages, then you may return a verdict for the Plaintiffs in some nominal sum such as one dollar.

On the other hand, if you find that the Plaintiffs are entitled to either actual or nominal damages, they you may consider punitive damages. If you find that the Defendants were motivated by an evil motive or intent, or acted with a reckless or callous indifference to Plaintiffs' constitutional rights, you may award punitive damages. The purpose of punitive damages is to punish the Defendants for malicious or grossly wrong conduct and to deter similar conduct by others. Whether you decide to award punitive damages should be based on whether you find that the Defendants were willful or malicious in violating Plaintiffs' constitutional rights, or that their acts were intentional in gross disregard of Plaintiffs' constitutional rights. Note that even if you determine from the evidence that an award of punitive damages is appropriate, your verdict at this stage of your deliberations should not include a

specific amount for punitive damages. You are asked to determine only whether punitive damages are appropriate.

In considering the issue of Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more or no less. Damages cannot be based on speculation, because only the damages that I have described to you are recoverable.

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indicated that I believe the Plaintiff should, or should not, prevail in this case.

* * * * * * * * * * *

This concludes my instructions on the law that applies to this case. Before I make my final remarks on your duty as jurors, the lawyers will be given an opportunity to deliver their closing arguments.

* * * CLOSING ARGUMENTS * * *

Before you begin your deliberations, I want to talk with you for a moment about your duties as jurors.

When you reach a verdict, your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees with the decision. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one anther and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinions, if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict from to the jury room and when you have reach unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom

If, during your deliberations, you should desire communication with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer who will bring it to my attention. I will the respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with regard to any message or

question you might send, that you should never state or specify your numerical division at the time.

DATED: March 18, 1994